

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

_____)	
Julie O'Shaughnessy,)	
)	
Plaintiff,)	
)	Case No. 2:20-cv-00470-HCN-DBP
vs.)	
)	
Young Living Essential)	
Oils, LC, et al.,)	
)	
Defendants.)	
_____)	

**MOTION HEARING VIA ZOOM BEFORE THE
HONORABLE HOWARD C. NIELSON, III**

Wednesday, March 17, 2021

Time: 1:00 p.m. to 2:38 p.m.

Reported by Teena Green, RPR, CRR, CBC

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March 11, 2021

1:03 p.m.

P R O C E E D I N G S

THE COURT: Good afternoon.

We're here for a video hearing in *Julie O'Shaughnessy versus Young Living Essential Oils, LC, et al.*, Case No. 2:20-cv-470. The purpose of this hearing is to hear argument on Docket No. 98, Defendant's Motion to Dismiss.

Now, I know you've introduced yourself to the courtroom deputy, but for purposes of the record I'm going to ask for appearances of counsel.

First, counsel for plaintiff.

MR. VON MAACK: Your Honor, Chris Von Maack on behalf of plaintiff. And I must say, the pandemic beard suits you.

THE COURT: Thank you.

MR. HUNT: Your Honor, Jeff Hunt on behalf of the Young Living defendants. And appearing today also on behalf of Young Living is Jeremy Fielding, Olivia Adendorff, and I believe maybe Grant Jones from the Kirkland & Ellis firm in Dallas, Texas.

And the client representatives at the hearing, Your Honor, are Joe Cannon, who is the CEO of Young Living, and Brent Bishop, who is the chief legal officer, and Saul Speirs, who is in-house counsel for Young Living.

MR. LINKIN: Your Honor, this is Robert Linkin from Austin, Texas. We represent the plaintiff, Julia

1 O'Shaughnessy. I'm here with Austin Tighe of Nix Patterson and
2 David Rowe from Dubois Bryant & Campbell.

3 **MR. VON MAACK:** I think you're muted, Your Honor.

4 **THE COURT:** Sorry, there was a doorbell in the
5 background that I was trying to mute out.

6 All right. Do we have other counsel that's not entered
7 an appearance yet or that's not made --

8 **MR. TIGHE:** Yes, Your Honor, also with Kirkland &
9 Ellis is Rachael Rezabek, so she's also appearing on behalf of
10 the defendant, Your Honor.

11 **MS. REZABEK:** Good afternoon, Your Honor.

12 **THE COURT:** Good afternoon, Ms. Rezabek.

13 All right. Anyone else that we've missed?

14 Okay. Give me just one moment.

15 (A recess was taken.)

16 **THE COURT:** All right. I apologize for that delay.
17 All right. I think we'd finished with appearances.

18 Now, because we are holding this hearing by
19 videoconference, we need to be careful to ensure that the
20 reporter can create an accurate transcript, especially given the
21 number of counsel that we have.

22 First, please state your name and role each time you
23 begin speaking, unless I specifically ask you to speak in a way
24 that leaves no question who is talking.

25 Second, please speak slowly and clearly.

1 Third, please do not speak over each other or interrupt
2 and please speak only when directed to.

3 I will give each party the opportunity to make the
4 points and arguments that it wishes to make, but we will need to
5 take turns.

6 And finally, I see that all of you are doing this,
7 please put your microphone on mute when you are not speaking to
8 reduce background noise.

9 Now, in terms of logistics, will we be having -- who
10 will be arguing for the defendants? Will it be a single counsel?
11 Will it be multiple counsel? Who is hoping to do that?

12 **MR. FIELDING:** Yes, Your Honor, it will be me, Jeremy
13 Fielding. I'll be arguing on behalf of the defendants.

14 **THE COURT:** All right. Thank you, Mr. Fielding.

15 And who will be arguing on behalf of the plaintiff?

16 **MR. LINKIN:** Your Honor, it will be myself, Robert
17 Linkin and Austin Tighe. We'll be splitting up our argument
18 between the different two points raised in the defendant's
19 motion.

20 **THE COURT:** All right. I gather one will be the
21 issue of the preemption and the other will be the issue of the
22 sufficiency of the pleadings, is that -- am I assuming
23 correctly?

24 **MR. LINKIN:** That's exactly right, Your Honor.

25 **THE COURT:** All right. Very well. All right. Now

1 since it's the defendant's motion, I think we'll start with
2 Mr. Fielding.

3 Ordinarily, I ask quite a few questions and tend to
4 interrupt probably more than I should. That doesn't tend to work
5 as well on a Zoom setting. So what I think I'll do is I will try
6 and give you, oh, about 15 minutes of time just to talk without
7 interrupting you. At that point, I may start asking you
8 questions. These are not necessarily hard time limits.

9 I have read the briefs. Please don't feel like you
10 need to repeat all of the points in your briefs. You're
11 certainly not going to waive any arguments that you made in your
12 brief because you don't repeat them today. I think it's more
13 helpful to me **if** you distill your briefs and your arguments into
14 what's most important, if you **will** emphasize, clarify, that sort
15 of thing.

16 But with that preliminary, I think I'll let you begin,
17 Mr. Fielding. **So** please go ahead.

18 **MR. FIELDING:** **Thank you**, Your Honor. I'm going to
19 share my screen. I've got a PowerPoint presentation, if that's
20 okay.

21 **THE COURT:** That's fine.

22 **MR. FIELDING:** Can everyone see it?

23 **THE COURT:** I can see it.

24 **MR. FIELDING:** All right. Thank you.

25 So, Your Honor, we ask you to dismiss the claims the

1 plaintiffs have filed today in their entirety and with prejudice
2 for two specific reasons.

3 First, because the RICO claims are barred by the PSLRA.

4 And second, because the plaintiffs have failed to plead
5 their claims with the required particularity, not only with
6 respect to the RICO claims themselves but also -- and especially
7 with respect to the fraud claims that form the predicate acts
8 under the RICO statute.

9 Now, Your Honor, there are -- the two reasons why you
10 should dismiss -- and by the way, these are both independent
11 reasons. So obviously, if you agree with us that the first claim
12 is -- that the claims are barred by the PSLRA, that is an
13 independently fatal reason and you don't even need to even
14 continue on with the pleadings issues. And the same is true
15 about the pleadings claims. Those stand to rise on their own
16 independent merits.

17 But these two reasons why the claim needs to be
18 dismissed stem from two fatal defects in the plaintiffs'
19 underlying facts and their case. And the first is that the
20 plaintiffs are trying to cram a nonRICO set of claims into a
21 round RICO-sized hole. And the only way you can do that is by
22 doing great violence both to the claims and the thing that you're
23 pounding into. And that's the reason why they struggle so much
24 to allege -- and their pleadings are so disjointed and the
25 enterprise is alleged in a lot of different alternative ways is

1 because of that. And they have reasons they want to do it, they
2 obviously are motivated by the fact that RICO has, as the other
3 courts have recognized, an in terrorem effect because of the
4 availability of treble damages, but also, Your Honor, I think
5 they recognize they have significant and serious problems if they
6 have to bring these claims under the PSLRA.

7 And that, frankly, Your Honor, leads into the second
8 problem, kind of fatal defect in their case, and that is, their
9 fraud claims are incoherent on their face. And here's what their
10 fraud claims are, and I think this is important because it
11 distinguishes this case especially from some of the other cases
12 that they cite.

13 The essence of their fraud claim, they call it the
14 cornerstone of their case, is that defendants have created an
15 unlawful pyramid scheme by emphasizing new member recruitment
16 over the sale of products. They say that's the telltale
17 characteristic, is that the comp structure emphasizes recruitment
18 over the sale of products.

19 But then, Your Honor, the evidence they cite, the only
20 evidence they cite to support this claim that this is a pyramid
21 scheme, is the comp structure itself. In fact, in paragraph 27
22 of their complaint they say, "Just a ' cursory review ' makes it
23 ' abundantly clear recruiting is prioritized over the sale of the
24 product in the Young Living system to a fault. '"

25 Now, here's the problem, Your Honor:

1 The plaintiffs had full and 1,000 percent disclosure of
2 this compensation plan at the time they joined Young Living as
3 distributors. It was disclosed to them, they acknowledged it,
4 they were aware of it. And so this leads to the kind of
5 fundamental disconnect in their fraud claim.

6 To compare it to a kind of classic pyramid scheme,
7 Your Honor, like a Ponzi scheme, the Madoff scheme, this would
8 be -- their theory would be the equivalent as if Madoff brought
9 an associate in and says, "I'm going to tell you what I'm going
10 to do with your money, but I need you to help me go out and
11 recruit other people and I'm going to use those other people to
12 help pay you back."

13 Now, if that person turned around, and they might have
14 a variety of things they could say of Mr. Madoff, but they
15 certainly could not accuse him of fraud, and that's the
16 disconnect that lies at the heart of the problem. So over and
17 over again, Your Honor, the question the plaintiffs are supposed
18 to answer, but they can't answer, so they continue to default to
19 pabulum and conclusory statements, is what was the
20 misrepresentation or the promise or the omission that was
21 supposedly made to you that caused your harm?

22 And the problem is they say what it was, they say it
23 was the compensation plan, but they received that plan and they
24 had that plan. I'll note, Your Honor, we vigorously dispute the
25 fact that our compensation plan is a pyramid scheme or that it

1 has any of the effects that they describe. And the irony is,
2 Your Honor, so apparently do the plaintiffs, because with full
3 knowledge and disclosure of the very same plan, they said yes to
4 it.

5 And effectively what the plaintiffs are arguing is that
6 we conscripted someone into a participation in a fully disclosed
7 pyramid scheme. That's a lot of things but it's not fraud, and
8 it falls apart on its face. And that explains the problems they
9 have over and over in the case.

10 Now, let me address the two key points, Your Honor,
11 that I want to hit.

12 First, the RICO claims are barred by the PSLRA.
13 Everybody agrees the test here and everybody agrees that *Howey is*
14 the test and everybody agrees that *it's* the third prong of *Howey*
15 that matters here. And the language from *Howey*, of course, is
16 whether the -- if it is a scheme, that's important because that's
17 one of the things that they allege, where a person invests money
18 and is led to expect profits from the efforts of the promoter or
19 a third party.

20 That "or a third party" is very important in the MLM,
21 the multilevel marketing, context like this particular case,
22 because, as you'll see in both the cases that come out, finding
23 this is a *PSLRA* kind of case. And in the plaintiff's own
24 pleadings, that's what they allege. They allege that the profits
25 and funding that go to the top flow from third parties; namely,

1 people in the downline underneath.

2 This is -- and in the *Howey* case, it's important to
3 note, the Court acknowledges that this is a flexible standard and
4 it's capable of adaptation to meet countless and variable
5 schemes. So it's not just the kind of standard investment, you
6 know, Ponzi scheme, Bernie Madoff style, it's also any other
7 variable and countless scheme that meets that description.

8 What this means, Your Honor, as several courts have
9 recognized, including the Ninth Circuit Court of Appeals and the
10 DC Circuit Court of Appeals, is that pyramid schemes are on their
11 face covered by securities. They are a securities contract.
12 This is the language from the *Webster* case. They cite to a
13 previous case in the *Webster* case court. The Ninth Circuit says,
14 "If Omnitritions Program is a pyramid scheme, investments in
15 the program supervisor positions are securities, just as a
16 de facto matter."

17 But the Court in *Webster* takes it a step further and
18 explains why. And the Court says, "By the very structure of the
19 scheme, the participants' efforts are focused not on selling
20 products but on recruiting others to join the scheme."

21 This is an important observation by the Ninth Circuit
22 in the *Webster* case because it's the same argument the plaintiffs
23 make to try to escape from this. They say the participants are
24 the ones that are focusing on this and that's what *Howey* doesn't
25 apply, but in fact, as the Ninth Circuit recognized, that's

1 exactly the kind of circumstances that would be, quote, enough to
2 bring the investments in the program within the definition of an
3 investment contract.

4 And, of course, it's important to note that the *Webster*
5 case was a multilevel marketing case. That's what the party
6 being sued was in that case.

7 Now, the Ninth Circuit is right about this, Your Honor,
8 and it's because the way that a pyramid scheme works on its face,
9 when it's a pyramid scheme, is that the money flows from the
10 bottom to the top. But what it means is that the people that are
11 recruiting aren't the ones that are actually generating the funds
12 that go to the top. Yes, they have to do some effort to recruit,
13 but the only way that it turns into a profit is if people
14 underneath them actually contribute money to the pyramid.

15 And that's the key element that these cases all
16 recognize, that the plaintiffs seem to be missing, is it's not
17 the effort that goes into the recruiting that matters, it's the
18 source of the funds that flow up. And without the funds flowing
19 from these third parties, who are not the plaintiff, there can be
20 no pyramid scheme.

21 Now, here's the thing, Your Honor, the plaintiffs agree
22 with this. This is a quote from their complaint, paragraph 37.
23 "Those few at the top reap untold riches funded by all the lower
24 level members paying into the system."

25 Not the plaintiff. The plaintiff can't get profits

1 because of the money she pays in. It's the other people under
2 her, in her downline that she recruited, but mostly that the
3 people she recruited also recruited, that create the basis of the
4 profits that flow up through a pyramid scheme.

5 I mentioned that the Ninth Circuit reached this
6 conclusion, the DC Circuit Court of Appeals agrees with this.
7 This is the district court case, but it was affirmed by the DC
8 Circuit in an opinion. The District Court case wrote, "The
9 capital fund bonus system is a pure pyramid scheme. Independent
10 representatives earn income from the system solely through the
11 recruitment of new members."

12 And again, that's exactly the allegation word for word
13 that the plaintiffs are making in this case, which leads us to
14 the decision by a judge that is virtually anyway, if you consider
15 St. George virtually across the hall from you, who reached the
16 exact same conclusion on nearly indistinguishable set of facts in
17 the *Smith* versus *LifeVantage* court case.

18 And in this case, Judge Nuffer -- I mean if you look at
19 the claims, it's actually the same. It's a multilevel marketing
20 company. The allegation is it's a pyramid scheme. They point to
21 the compensation plan and they say the compensation plan ties the
22 profits to recruiting. And it's -- and that, they say that
23 directly tied to recruiting and forming a downline, that's what
24 creates the pyramid scheme. That was the allegation there.

25 In agreeing that it was covered by the securities --

1 and I'll note, Your Honor, in their opposition brief, the
2 plaintiffs try to make it seem like, well, Judge Nuffer really
3 didn't look at this issue. And that's a slight of hand. It's
4 true that in that particular case, the defendants did not
5 claim -- did not have a RICO claim and there was no contest
6 there. But Judge Nuffer still had to make a decision and a
7 determination at the motion to dismiss stage whether the
8 securities laws applied in the first place, and he did so.

9 And he wrote, "Courts, including the Tenth Circuit,
10 have broadly interpreted the *Howey* test so the word solely must
11 not be given an unduly restricted application," which is exactly
12 what the plaintiffs are trying to do. "Therefore, when
13 investment in the plan, where profit comes, if not solely, at
14 least predominantly from the efforts of others; namely, the
15 downline members, it falls under the definition of a contract."

16 This is a case from last year, in December, from a
17 sister court of yours. And it is squarely on point and compels
18 the same conclusion that the Ninth Circuit Court of Appeals did
19 and the DC Court of Appeals said. And again, it's a recognition
20 that it's the money from the downline that's what powers the
21 scheme.

22 I can recruit until the cows come home, but if those
23 people under me, and in my downline that other people recruit,
24 choose not to buy, there is no money in the system. And it's all
25 those efforts and all those decisions that have nothing to do

1 with me that matter.

2 Now, Your Honor, if you want additional cases, I've
3 focused on two, or three actually, because they are Circuit Court
4 cases of appeal. Obviously, as you know, the plaintiffs have a
5 couple of cases they've cited that I think are distinguishable
6 for the reasons we outline in our brief. Those are both district
7 court cases, but to the extent the Court wants to see in our
8 footnote, in our reply brief, we cite to several other cases
9 where courts have reached a similar conclusion, that a pyramid
10 scheme allegation is barred by the PSLRA, as the defendants argue
11 here.

12 Now, let me deal with the two arguments that plaintiffs
13 make in response to this.

14 The first argument that the plaintiff makes is they
15 say, "Oh, yeah, this DC Circuit Court of Appeals case, the
16 *LifeVantage* Court of Appeals case, the Ninth Circuit Court of
17 Appeals case, all those decisions rely on facts that are
18 different than ours."

19 That's just nonsense, Your Honor. They're just wrong
20 about that, and all you have to do is compare it. So what I've
21 done, this chart literally tracks the theories with each case,
22 *LifeVantage*, *International Loan Network*, which is the DC case,
23 and *Webster*, which is the Ninth Circuit case, and it compares
24 those allegations and theories to the ones that are alleged here.

25 In the *LifeVantage* case, the central allegation is that

1 *LifeVantage* is an illegal pyramid scheme.

2 In *International Loan Network*, the capital fund bonus
3 system is a pure pyramid scheme.

4 In *Webster*, *Omnitron's MLM marketing* program is a
5 pyramid scheme.

6 And here, defendants have created nothing more than an
7 unlawful pyramid scheme.

8 And that central theory, Your Honor, is buttressed with
9 almost identical allegations. In *LifeVantage* they talk about how
10 the money in the plan is tied to recruiting and forming a
11 downline.

12 In the *International Loan Network* court, the plaintiffs
13 made the same allegation. And in the *Webster* case, very same
14 allegation.

15 And then here, you can see what the plaintiffs have
16 alleged in paragraph 33. "The system is designed for one
17 purpose, to recruit new members to grow the illegal pyramid."

18 Finally, in each one of those cases, the allegation,
19 just like here, is that the profits from that scheme come from
20 these lower level people down in the downline. That was the
21 allegation in *LifeVantage*. That was the allegation in
22 *International Loan Network*. It was the allegation in *Webster*,
23 and it is the allegation here, in paragraph 57.

24 **THE COURT REPORTER:** Counsel?

25 **MR. FIELDING:** Yes.

1 **THE COURT REPORTER:** This is Teena, the court
2 reporter.

3 **MR. FIELDING:** Yes, ma'am.

4 **THE COURT REPORTER:** I am not getting anybody's
5 attention somehow, but can you please slow down, just even a
6 little bit.

7 **MR. FIELDING:** Yes, ma'am, I will.

8 **THE COURT REPORTER:** Thank you so much. And please
9 don't forget because you are so articulate and so well-spoken
10 but you are fast.

11 **MR. FIELDING:** You're not the first court reporter
12 that's told me that, it probably won't surprise you to hear,
13 but I will -- I appreciate that.

14 **THE COURT REPORTER:** That's a compliment. There you
15 go.

16 **MR. FIELDING:** So that's the first response. When
17 they say that these cases are distinguishable, they're not. In
18 fact, they're almost mirror images of each other.

19 The second response that the plaintiffs make to this
20 PSLRA bar claim is they say, "Look, what distinguishes these
21 other cases from our cases," they say, "is that here, the profits
22 were going to come from the victims themselves." And they say,
23 "That makes all the difference in the world."

24 Here's the problem, Your Honor, that contradicts their
25 own pleadings. That's not even what they allege. What they

1 allege in their case -- this is in the section -- in the section
2 where they are discussing how the compensation plan that
3 everybody got that supposedly would have -- anybody looked at
4 would have known it was a pyramid scheme, how that structure
5 incentivizes people and makes it impossible for someone on their
6 own to ever recruit enough people to make money.

7 So here's what they say, "Members earn commissions only
8 from starter kits, not from other places, but only when they sell
9 to newly recruited Young Live [sic]members," which again that
10 person, third party has to make a decision to buy when they're
11 purchased --

12 **THE COURT:** All right. Counsel, again, you really do
13 need to slow down.

14 **MR. FIELDING:** Yes.

15 **THE COURT:** There's no noticeable decrease in speed
16 since the reporter spoke up.

17 **MR. FIELDING:** All right.

18 When they're purchased by their downline members, or
19 when they're recruited by their downline members.

20 So again, you can see that they're talking about these
21 third parties that have to do this. And then, one of the things
22 they point out is -- as an example of this goal that is so
23 unachievable, they say, "In order to get one of these high
24 rankings at the company, you have to meet an OGV of 1.5 million."
25 And they say that would take a downline of 15,000 members, which

1 they then say, "is impossible for me to do by myself." And
2 that's the whole point, it has to come from the efforts of
3 others.

4 It's also that allegation that like the -- where they
5 say that this only comes from the efforts of the people
6 themselves, it directly contradicts, Your Honor, what they said
7 in their opposition at page 5.

8 In page 5 of their opposition they say, "Those profits
9 were to come from the efforts of punitive class members," such as
10 the plaintiffs. Here's the thing, they can't point to the fact
11 that all of these plaintiff class members are paying. They have
12 to look at this from the perspective of the individual plaintiff.
13 And what they're saying is, "The only way this individual
14 plaintiff is going to make a profit is if all of these other
15 class members pay into the system."

16 That is a classic example, as the Ninth Circuit, DC
17 Court of Appeals and Judge Nuffer have noted, of a pyramid scheme
18 allegation that the PSLRA preempts.

19 Last point that I would make on this, Your Honor, the
20 argument that they're making, that if the -- that the mere
21 participation of a class member in the scheme somehow makes a
22 difference, was explicitly rejected by the Ninth Circuit in the
23 *Webster* case.

24 In that case, like the plaintiffs here, the plaintiffs
25 argued that this, "success of a participant in its program

1 depends on the participant's own efforts and hard work."

2 Then the Court says, "We reject that kind of strict
3 interpretation."

4 And then they note, by the very structure of the
5 scheme, participants' efforts are focused on not selling products
6 **but** on recruiting others to join the scheme, this is enough.

7 The same thing is true in the DC Circuit case. The
8 parties made -- the plaintiff made the same argument and the
9 Court rejected it. And it said, "Without a doubt, to earn money
10 through the capital fund program, requires some every effort on
11 the part of the investor. **If** each of them recruits one person,
12 who recruits one person, who recruits one person, an investor
13 will already have a five-level downline.

14 So they're noting, "All of this work happens underneath
15 me, including by people that I didn't even recruit." And then
16 they adopt the approach of the Ninth and the Fifth Circuit and
17 conclude that it's an investment contract.

18 And then, of course, finally, this argument was
19 rejected by Judge Nuffer in the *LifeVantage* case. He wrote that
20 that -- that courts -- he noted that courts do not give an **unduly**
21 **restrictive** application to the word solely, and then noted that
22 where the profit comes not solely, at least predominantly from
23 the efforts of others; namely, from the downline members, it
24 falls in their definition of an investment contract governed by
25 the securities loss.

1 So for these reasons, Your Honor, we would ask you to
2 dismiss all of the claims asserted by the plaintiffs in this
3 case, because each and every one of them is barred under the
4 PSLRA. And we would ask you to do it with prejudice, obviously,
5 because this is not a problem that can be cured with pleading.
6 And in any event, they've already had two chances to do it.

7 Let me -- yes.

8 **THE COURT:** All right. Mr. Fielding, before you move
9 on, let me ask you just a couple of questions related to this
10 theory before we get into your next set of arguments.

11 **MR. FIELDING:** Yes, Your Honor.

12 **THE COURT:** So is your argument -- did I understand
13 you correctly, that a fully disclosed pyramid scheme is not
14 unlawful? Is that what you were saying at the very beginning?

15 **MR. FIELDING:** What I'm saying is that the plaintiffs
16 have to articulate -- plaintiffs have to articulate a
17 representation or a -- a misrepresentation or a false promise
18 that was made.

19 And my point, Judge, is it's hard for me to conceive of
20 how they could do that if their allegation is that the
21 obviousness of the pyramid scheme was evident on the face of the
22 commission plan that they were handed.

23 Now, Judge, I don't know, I can't answer the question
24 with respect to some other set of hypothetical facts. It only
25 underscores why, as we'll get to in a moment, it's so vital that

1 they plead those facts. If that, in fact, is their theory, they
2 need to identify that and explain why or how they were still
3 misled. They don't do that. And I think it will be very
4 difficult for them to do that. I think it will be impossible,
5 but they haven't even tried.

6 And I offer that explanation, Your Honor, so you
7 understand, A, why they haven't done it. This is not some mere
8 technical defect where -- in other words, it's not that they
9 can't or they won't or they haven't pleaded them, it's that they
10 can't possibly do so in any way that I can see that makes any
11 logical sense.

12 **THE COURT:** All right. So I mean, you -- you're
13 disclaiming the desire -- you know, you're disclaiming the
14 ability to speak to different hypotheticals. Of course, you
15 offered the hypothetical of the Madoff scheme at the beginning,
16 where, you know, he calls his associate into the office and
17 says, "This is what we're going to do: You pay me X amount of
18 dollars. You know, if you go out and recruit someone to pay
19 you, each person you recruit, have them pay you this amount of
20 money and you have to pay me this portion, and then tell them
21 they can do the same."

22 I mean -- and he had it all elaborately laid out, but
23 no products were changing hands, just -- you know, just money.
24 You know, each level pays in a certain amount of money, which is
25 divvied up among the people higher up. Would that be completely

1 lawful and not actionable by anyone?

2 **MR. FIELDING:** Well, it may be actionable by other
3 people under the scheme that didn't have it disclosed. It may
4 be actionable by the FTC. It may be illegal for a variety of
5 reasons. But as to that person, in order for them to claim
6 they were defrauded, the elements of fraud is, you have to tell
7 me something that's not true, or you have to withhold something
8 material from me.

9 And if everything was disclosed, here's the irony,
10 Your Honor, what the plaintiffs effectively are saying is, "We
11 were active and knowing participants." And here's why that
12 matters: Because our view is, the compensation plan says nothing
13 like that. And the fact that these plaintiffs looked at this
14 plan and they reached the same conclusion we think that any fair
15 fact finder will reach; namely, that it isn't a pyramid scheme,
16 is itself compelling evidence against the plaintiff's theory.

17 The point is that's not even a pleaded theory, other
18 than in terms of misrepresentations or promises. That is what
19 the plaintiffs claim happened here. But where their claims fall
20 down and their allegations fall apart is where we ask them,
21 "Okay, tell me, what were you told that wasn't true?"

22 And the only thing they can say is, "You sold me a
23 pyramid scheme and you're on the hook," but that's not the
24 question. The question is, is how were you led with incorrect or
25 false information? That's what fraud is. And that's the --

1 **THE COURT:** All right. I understand your argument on
2 that.

3 **MR. FIELDING:** Okay.

4 **THE COURT:** All right. On this -- I guess it's your
5 position that regardless of the details, anything that
6 qualifies as a pyramid scheme is, per se, a security. Is that
7 fair?

8 **MR. FIELDING:** I don't know that the Court has to go
9 that far. I think there's certainly support for that in the
10 *Webster* case and in the DC Circuit Court of Appeals case. But
11 I think that what is clear, Your Honor, is that on these facts,
12 which are in all material respects the same as in the
13 *LifeVantage* case, in the DC Court of Appeals, the *Webster* case,
14 and in the *International Loan Network* case, on those facts, the
15 Court can't reach any other conclusion other than there is a
16 pyramid scheme here, or that is to say that this particular
17 kind of a pyramid scheme is a security.

18 I don't think you need to get to the broader question,
19 though I think there's plenty of authority to support that
20 proposition, Your Honor, if the Court chooses to accept it.

21 **THE COURT:** Okay. And just in terms of alleged
22 pyramid schemes that are in the form of kind of an MLM business
23 model, like Young Living -- it looks like *Webster*, the Ninth
24 Circuit case, clearly was some kind of an MLM.

25 **MR. FIELDING:** It was.

1 **THE COURT:** Is that correct?

2 **MR. FIELDING:** It was.

3 **THE COURT:** Yeah, and it looks as though Judge
4 Nuffer's case was also some kind of an MLM.

5 **MR. FIELDING:** Yes, it was.

6 **THE COURT:** In the DC Circuit, it's a little harder
7 to tell. Maybe it's kind of an MLM, but it seems like, if it
8 was, it didn't seem like they were selling a product as opposed
9 to some kind of an investment. It's hard to tell from the
10 facts, but it doesn't look like the same kind of an MLM as the
11 ones at issue in the other two cases. Am I misunderstanding
12 that?

13 **MR. FIELDING:** No, I think -- I think what is clear
14 is that the Court -- the DC Circuit Court and then the Ninth
15 Circuit never characterized it as an MLM, like they did in the
16 Ninth Circuit case and Judge Nuffer did.

17 I will note, though, Your Honor, that it shares all the
18 characteristics of the MLM, and I'm quoting from case, "Namely,
19 that the downline members from whose fees the plaintiff expects
20 to derive most of his wealth."

21 So there's a reference to downline members, and that is
22 where I think the commonalities, the material commonalities
23 between this case and the other case, and our case come into
24 play.

25 I'll also note for the Court, in Footnote 6, where

1 there's a list of other cases, where the Courts have reached
2 similar conclusions, there's one other case involving an MLM.
3 The *SEC versus CKB168 Holdings* case, that also explicitly, the
4 Court says, involved a multilevel marketing company.

5 **THE COURT:** Which one was that again?

6 **MR. FIELDING:** I'm sorry?

7 **THE COURT:** Could you repeat that.

8 **MR. FIELDING:** Yeah, that's *SEC versus CKB168*
9 *Holdings, Limited*. And the cite is at paragraph -- or at
10 Footnote 6 in our reply brief. It is an Eastern District of
11 New York case from 2016.

12 **THE COURT:** All right. Thank you. I appreciate
13 that.

14 All right. I think those are the primary questions I
15 have now. Why don't you proceed with your second argument.

16 **MR. FIELDING:** Yes, Your Honor.

17 So let me deal then with our second argument, which is
18 the plaintiffs have failed to plead their claims with the
19 required particularity.

20 Now, here's what's important, is the plaintiffs have
21 obviously any kinds of things that -- they can make any choice
22 they want about the kind of predicate act that they claim is the
23 basis of their RICO claim, but the one they've selected, the only
24 one they've pleaded, is fraud. And that's clear on the face of
25 their complaint, that the RICO case is premised upon an intent to

1 defraud, deceive, mislead or fraudulently induce.

2 Now, here's why that matters. Why that matters, of
3 course, is because that dictates the pleading standard that they
4 have. And then because they've alleged a fraud claim, it -- as
5 the Court knows, it's a heightened standard. It requires -- Rule
6 9(b) requires that it be pled with particularity.

7 In the Tenth Circuit, in **the** Schwartz case, but it
8 could have been -- there's dozens of cases that say same thing,
9 it identifies at a minimum what this requires. And what this
10 requires is that the plaintiff must plead the time, the place,
11 the contents of the false representation, that is to say what was
12 it, why was it false, the identity of the party that made it, and
13 the consequences of it.

14 So they've got to link any particular false statement
15 to -- like causally to the harm that they're seeking in the case.
16 That's standard they have to do with respect to each defendant and
17 with respect to each claimed fraud or misrepresentation.

18 And so again, you see across the bottom, you'll see
19 this again, if you're a plaintiff and you can't check every
20 single one of these boxes with respect to your fraud claims, then
21 you failed your burden under the Rule 9(b).

22 Now, importantly, that duty not only applies to
23 affirmative representations, but it also applies to omissions.
24 And the defendant has to identify, with respect to any claimed
25 omission, who should have told him, when they should **have** told

1 him, what they should have told him, why that information was
2 material and the consequences of the failure to do so.

3 Finally, the case law is clear -- this is the George
4 case from the Tenth Circuit in 2016, makes clear that this
5 obligation doesn't somehow go away when the predicate -- when
6 you're using fraud as a predicate for RICO. The Court makes
7 clear that because -- the Tenth Circuit made clear that because
8 Federal Rule 9(b) requires a plaintiff to plead mail and wire
9 fraud with particularity, the RICO plaintiffs must set forth the
10 time, place, contents of the false representation, the identity
11 statements, consequences, same checklist.

12 Last point that's important to note here, Your Honor,
13 and that is courts have also held that so-called lumpy pleading,
14 I don't know if that's a word but it makes sense to me, lumping a
15 bunch of defendants together and saying the defendants did this
16 or said this or made this representation doesn't work. You have
17 to plead specific facts with respect to each defendant and you
18 have to do it not just for fraud, but as you can see here in the
19 *Walker* case, Your Honor, you have to do it for RICO. And
20 that's -- that's important and significant, separate and apart
21 from the fraud claim.

22 The Schwartz case itself is instructive. In that case,
23 the Court found that the plaintiffs had adequately pleaded. And
24 if you look, they identified why, the time, the place, the
25 contents, describes them with particularity and even quotes them,

1 specifically alleged the facts the statements misrepresented or
2 failed to disclose.

3 These are all the things that every plaintiff has to do
4 and they're things that the plaintiff here utterly and completely
5 failed to do.

6 Now, this requirement, Your Honor, that you plead --

7 **THE COURT:** Let's see, Mr. Fielding, this is -- how
8 many slides do you have on this? I mean this is an awful lot
9 of detail on the Rule 9(b).

10 **MR. FIELDING:** Yeah.

11 **THE COURT:** I'm certainly familiar with 9(b).

12 **MR. FIELDING:** Fair enough, Your Honor. I'll jump
13 ahead here.

14 The key, though, is the purpose of this and this is --
15 this is I think important for RICO, Your Honor, is that
16 everybody's entitled to an individualized analysis. It has to be
17 on an individual basis.

18 Okay. So here's what I want to do now, Your Honor, if
19 you look in this case, what I've done is I -- because I went back
20 and read their pleading, and I see in their response they say,
21 "We've done all this." And I've literally identified each one of
22 the situations where they -- they made some kind of claim about a
23 misrepresentation. So we can look and see, did they plead these
24 particular things? Right?

25 So here they are and I've listed -- there's -- the

1 paragraphs are across the bottom, but you can see that every one
2 of these, Your Honor, is a generic claim that doesn't say time,
3 place, content, identity or consequence. Promises of riches,
4 falsely represent spiritual and material riches, vast promises of
5 financial awards. That's a lumped pleading.

6 The defendants' operations. The members are
7 financially induced by defendants to recruit new representatives
8 through materially false representations. Which representations?
9 By whom? When? How did you rely upon them? How did those cause
10 you damage? None of that is identified.

11 The reason, Your Honor, that's really important,
12 obviously, is because if they had identified those things --

13 **THE COURT:** All right. You're going to need to slow
14 down just a little bit.

15 **MR. FIELDING:** Yes.

16 The reason, Your Honor, that that's important is
17 because if they had identified these specific things, then this
18 would be part of the Court's gatekeeping function at a motion to
19 dismiss, to determine if these alleged misrepresentations
20 actually were misrepresentations. But we -- but the plaintiffs
21 have prevented us from doing that because they haven't identified
22 what they are, which creates a double problem for us. And it's a
23 reason why the rule exists in the first place.

24 Here are three more paragraphs. This is paragraph 50,
25 51A and 51E. All the defendants participate in illegal fraud

1 through their statements and actions, do not identify any
2 statements by any individual defendant anywhere, or any action
3 that constitutes fraud, other than these generic and conclusory
4 assertions.

5 In paragraph 51A, "Young, Turner and the other members
6 of the RICO conspiracy agreed to use false and fraudulent
7 pretenses through materially misleading statements."

8 **THE COURT:** All right. All right. Counsel, I
9 understand your 9(b) argument. Why don't you move to any other
10 pleading defects you want to address. I know you have other
11 things about the failure to properly allege an enterprise --

12 **MR. FIELDING:** Yes, yes, Your Honor.

13 **THE COURT:** Whether there's -- you know, whether the
14 enterprise is distinct from the person, also whether or not the
15 enterprise is distinct from the predicate acts. Why don't you
16 move on to those.

17 **MR. FIELDING:** Of course. Of course, Your Honor.

18 And, of course, our position on this is because they
19 haven't provided the answers to all of these questions, you have
20 to dismiss all of their claims because it's the predicate for all
21 their claims.

22 Let me deal with some pleading defects, Your Honor,
23 with respect to individual counts. And I'm going to focus on
24 just a couple here, Your Honor. I know we make other claims in
25 our briefing. And again, I think these are the ones that would

1 benefit most from me pointing out and providing some additional
2 information with. And to the extent the Court has questions
3 about anything that I don't mention, I'm happy to answer those
4 questions.

5 **THE COURT:** Well, let me -- how about I help you
6 frame this.

7 I think you make some fair points on the enterprise
8 versus person. But what about theory that the two individual
9 defendants are the persons and Young Living itself is enterprise.
10 What's wrong with the pleading there?

11 **MR. FIELDING:** Yeah. I will tell you that I think
12 that's the closest call in the case. The case law is, frankly,
13 muddy on this issue. We've cited some cases that we think
14 stand for the proposition that support our position on that. I
15 know that the plaintiffs have cited some cases that seem to
16 come out the other way, and I think there's just some messiness
17 here about that. I think that, on balance, the authorities
18 favor us, but I agree that that's a close question, Your Honor.

19 **THE COURT:** All right. And I don't think you need to
20 belabor your arguments, beyond what you did on the brief, on
21 the other theories of the person versus enterprise. The
22 foundation is the enterprise or the combination of the two
23 individual defendants is the enterprise, and then each
24 individual is one of the persons. I think you make your points
25 in brief and I understand your arguments there.

1 **MR. FIELDING:** One hundred percent agree, Your Honor,
2 and I'm not going to address those for that very reason.

3 **THE COURT:** Okay. Also on this -- on the enterprise
4 versus the predicate act or the series of predicate acts, I
5 guess my question here -- and I don't know if this is fairly in
6 the pleadings or not, but certainly, Young Living, as an
7 enterprise, does do things other than the alleged predicate
8 acts, doesn't it? I mean if I were to accept that Young Living
9 is an enterprise, I mean among other things, it makes these
10 products. I mean it makes essential oils, doesn't it?

11 **MR. FIELDING:** It does. It does. It makes --

12 **THE COURT:** Okay. So it does do something other than
13 these alleged fraudulent misrepresentations of abundance or --
14 you know, I mean leaving aside the 9(b) issue.

15 **MR. FIELDING:** Well, yes, except that what they
16 claim, Your Honor, is that the whole purpose of this is not to
17 actually sell product, it's just to engage in a pyramid scheme
18 to collect funds. So that is the only tension there,
19 Your Honor, is between their allegations and that.

20 I think the broader problem here, Your Honor, with
21 respect to this enterprise issue, has to do with Count III. And
22 it's the fact -- it's where they're trying to use the foundation
23 as the enterprise. And here's where they run into an enormous, I
24 think, pleading deficiency.

25 So remember, their allegation is that the Young Living

1 Foundation -- this is the basis for the claim against Young
2 Living as a defendant. They say the Young Living Foundation
3 constitutes an enterprise and they allege that it's because Young
4 Living used the Young Living Foundation through a pattern of
5 racketeering. And here, Your Honor, here's the key **question** that
6 they have to answer in their pleading, how did this happen?
7 Right?

8 **THE COURT:** All right. Mr. Fielding, I understand
9 your argument very well on that. I think -- I think probably
10 the most viable claim that plaintiffs have alleged here is --
11 and again, I'm not suggesting -- I mean I don't mean to suggest
12 a firm view on the other claims, but I think the one that
13 you -- that your answers probably make -- appear to be the
14 closest question is just, you know, the individual defendants
15 is the persons and Young Living is the enterprise.

16 **MR. FIELDING:** Yes. Yes. I agree with that,
17 Your Honor. And I think -- I think, again -- I've got on the
18 screen here the sole allegations they've made about the
19 foundation. I think you're right. I think it's a pleading
20 defect issue. It's not even an identify, you know, whether
21 they can be these two things at once. It's just a very simple,
22 they've just failed to identify how this foundation was
23 supposedly used for racketeering. These are literally the only
24 time foundation is discussed. So I think you have no choice
25 but to dismiss Count III.

1 And then, on the conspiracy side, I think they have
2 pleading defects there that are unrelated to this issue we've
3 been discussing about the, you know, relatedness. And that has
4 to do with the fact that they just have these conclusory
5 allegations that there's an agreement. We cite to cases from
6 several courts that say you can't just say they agreed, you have
7 to have a factual basis.

8 And then here are the paragraphs in their complaint
9 that talk about the conspiracy. And if you look, it's just these
10 general averments to mail fraud and wire fraud. And I'll note,
11 Your Honor, if you look at paragraph 62A, where they say, "The
12 acts of mail and wire fraud is described in paragraphs 75 to
13 101," what's fascinating is when you look at paragraphs 75 to
14 101, as the plaintiffs concede in their brief, none of those
15 things say anything about fraud being committed.

16 And the plaintiffs say, "We don't have to" -- you know,
17 and they're right. If they had other evidence of fraud, if they
18 had other specific evidence linking the individual defendants to
19 fraudulent acts that they made, when they made them, et cetera,
20 but they don't have that.

21 **THE COURT:** All right. Mr. Fielding, I do want to
22 clarify what you've just said.

23 I mean you agree with plaintiffs, I gather, that the
24 use of the mails and the use of the wires themselves don't have
25 to contain specific misrepresentations if they're in furtherance

1 of a fraudulent scheme, but your argument is, is it even
2 accepting that plaintiffs haven't alleged with particularity any
3 misrepresentations that are part of the scheme; namely, because,
4 you know, you're saying either it's -- it's just too vague, you
5 know, just these kind of unspecified promises of abundance and
6 said things along that nature.

7 And so, you know, even if the misrepresentations don't
8 have to be in the use of the wires or the mails themselves, they
9 have to be somewhere. Is that a fair characterization of your
10 position?

11 **MR. FIELDING:** It is, Your Honor. And to me, the
12 most telling example of where the plaintiff's claims are
13 lacking is in their opposition brief at page 25. This is where
14 they say -- first they say, "The heightened pleadings standard
15 doesn't apply," and that's just wrong for all the reasons we
16 cite in our brief, and all the cases that I've just showed you
17 already about that pleading standard in Rule 9 and RICO cases.

18 But they say this, they say, "We've done it anyway."
19 And they say, "It's been adequately alleged through materially
20 misleading statements of fact, important facts about Young
21 Living." And then helpfully, they tell us and the Court, "Look
22 at these paragraphs. You'll see where we've met our heightened
23 pleading burden, the what, when, who, where, how."

24 Here's the three paragraphs. This is paragraph 51A.
25 "They agreed to use false and fraudulent pretenses through

1 materially misleading statements of fact and nondisclosure."

2 62A is just -- it's verbatim the same thing.

3 73A, they reference the mail. In their opposition,
4 they say, "It doesn't have to contain any information." And look
5 what they say in that, Your Honor, each and every use of the mail
6 had the specific intent to defraud by means of false or
7 fraudulent representations, promises [sic] or promises.

8 So the problem they have is they've told us the three
9 paragraphs we can look at. And then when you look at the three
10 paragraphs, you get more conclusory statements and you certainly
11 get none of the who, what, when, where, how, why that Rule 9 and
12 the rules around RICO pleading require.

13 So that's the two reasons why we think the Court should
14 grant that and we think, Your Honor, you should do it with
15 prejudice as to all claims, even with respect to the pleading
16 difficulty. I guess I would say especially with respect to the
17 pleading deficiencies, with respect to RICO and the fraud.

18 And that has to do with two things. Number one,
19 they've already had two bites at the apple. A motion to dismiss
20 was filed previously, raised the PSLRA issue, raised these
21 pleading defects. They filed a new motion to dismiss. They've
22 already had the two bites, and the motion to dismiss practice
23 can't be a roulette wheel that they get to keep spinning until
24 they get -- until they land on black.

25 And secondly, and maybe more importantly, Your Honor,

1 it would be futile. And the reason that it would be futile to
2 allow them to amend is because of the problem that I identified
3 before, their theory of the case. Namely, you told me what I was
4 about to do and gave me a comp plan that told me how to do it and
5 then that -- I relied on that. I don't see how you create a
6 fraud claim around that.

7 So those are the two reasons why we would ask the
8 Court, when you -- if you grant and when we think you should
9 grant these motions to dismiss all these claims, that you do so
10 with prejudice.

11 **THE COURT:** All right. Thank you very much.

12 **MR. FIELDING:** Thank you, Your Honor.

13 **THE COURT:** Let's turn to the plaintiffs and give
14 them a chance to respond. And I believe we were going to have
15 Mr. Linkin and Mr. Tighe -- first of all, let's see if we can
16 stop sharing your screen.

17 **MR. FIELDING:** Yes, I'm doing that, Your Honor.

18 There we go.

19 **THE COURT:** Very good. Thank you.

20 Now, remind me on the plaintiff's side, Mr. Linkin,
21 Mr. Tighe, which one of you is going to address the preemption
22 argument?

23 **MR. LINKIN:** Good afternoon, Your Honor. I'm Robert
24 Linkin, I'll be handling the PSLRA argument. Mr. Tighe, from
25 Nix Patterson, will be handling the RICO directed arguments.

1 **THE COURT:** All right. Why don't you go ahead then.
2 I'd like to start with that. And I'm using it as preemption
3 for shorthand, but you understand what I mean.

4 **MR. LINKIN:** Absolutely, Your Honor.

5 **THE COURT:** All right. Please go ahead.

6 **MR. LINKIN:** Thank you, Your Honor, for the
7 opportunity to present our arguments in opposition to the
8 defendant's 12(b)(6) motion. I won't take an enormous amount
9 of time with the preemption argument.

10 As an initial matter, Judge, we recognize that the
11 Court may follow the holding reached by Judge Nuffer in the
12 *LifeVantage* decision, and find that a Young Living essential
13 rewards membership is, in fact, a security.

14 And as we noted in Footnote 2 of our response, should
15 the Court reach that decision, we would simply request the right
16 to amend our complaint to plead securities claims on behalf of
17 the plaintiff and the punitive class. Specifically, we would
18 bring claims related to 12(1) and 12(2) of the 33 Act, 10(b)(5)
19 claims under the 34 Act, if necessary, and any state securities
20 violations that might also be raised.

21 And to that, let me just say one thing in response to
22 Mr. Fielding's remark that any type of amendment would be futile.

23 Again, we don't think the Court has to find that our
24 claims are preempted by the PSLRA, but again, in the event that
25 the Court were to follow that *LifeVantage* decision, the defenses

1 raised by the defendants in *LifeVantage* who, not coincidentally,
2 are represented by at least some of the counsel who represent the
3 defendant here, those defenses did not work on the 12(b)(6)
4 motion, at least to the larger part of their securities claims,
5 and those claims have gotten past a motion to dismiss. So the
6 futility standard would hardly be met under those circumstances.

7 But, again, Your Honor, we don't think you have to get
8 there.

9 Certainly, we acknowledge that there are cases
10 throughout the judiciary that do find that the PSLRA bars RICO
11 claims with regard to pyramid schemes, but there are cases in
12 other circuits and in District Courts across the country that
13 have held that's not case, that RICO claims are appropriate in
14 allegations of a pyramid scheme.

15 For example, the *AdvoCare* case, which was decided in
16 2019, here in the Fifth Circuit where we're located, and that was
17 in the Northern District of Texas, and the *ViSalus* case. And
18 each of those cases held that under *Howey*, and *Howey's*
19 three-prong test, that these interests in a pyramid scheme are
20 not investment contracts. We all know what *the Howey* test is,
21 part one of three-part test is that it's an investment of money;
22 part two, in a common enterprise; and then part three, from which
23 the profits are expected to come solely from the *efforts* of
24 others.

25 And we also understand that here in the Tenth Circuit,

1 the *Crowley* decision expanded the term "solely" to really mean
2 primarily. But whether you plead solely or --

3 **THE COURT:** Counsel, just a moment. I just want to
4 make sure, on the cases -- and I'll let you finish your thought
5 in just a moment. I apologize for interrupting. But on those
6 cases, the two you primarily mentioned, I want you to repeat
7 them just so I have them down.

8 Could you do that?

9 **MR. LINKIN:** I'm happy to do that, Your Honor. And
10 if I'm going too fast, I hope either you or the court reporter
11 will let me know.

12 **THE COURT:** You're fine.

13 **MR. LINKIN:** The first is *Ranieri v. AdvoCare*,
14 Northern District of Texas. And both parties have cited that
15 case for different reasons.

16 **THE COURT:** Right. No. I just -- somehow the
17 pronunciation didn't register, but yes, when you repeated it, I
18 know which one you're talking about.

19 And the second one was?

20 **MR. LINKIN:** And the second was *Kerrigan v. ViSalus*,
21 Your Honor.

22 **THE COURT:** Okay. I'm familiar with that. For some
23 reason when you said them I didn't catch the names, but, yes, I
24 know those case. And both of those did involve MLM situations;
25 correct?

1 **MR. LINKIN:** Yes, Your Honor, that is correct.

2 So whether you use **the** term "solely" or primarily,
3 we're here on a 12(b)(6) motion to dismiss so we're talking about
4 pleading. We're not talking about a full record. And on a
5 12(b)(6) standard, we have certainly pled more than enough
6 factual information that relates to the efforts that our
7 plaintiff, Ms. O'Shaughnessy, and that punitive class members
8 have to exert in order to expect to profit from this pyramid
9 scheme.

10 We talked about in paragraph 8 of the complaint that
11 members make money through their own efforts. And what are those
12 efforts? It's a never ending cycle of recruiting that is
13 **attendant** to a pyramid scheme such as this one. It isn't that
14 you just hope for money to flow up from others, you have to
15 continue -- you have to continue to recruit and you have to
16 continue to encourage your recruits to recruit. That is the
17 effort. This is not similar to an investment in a security,
18 where you lay your money down, you know you're investing with
19 other investors, or the common scheme, and then you hope to reap
20 profits from the managers, the managers of **the** scheme or the
21 enterprise. This is different from that.

22 We pleaded in further detail **those** efforts in
23 paragraphs 22, 27, 34, 35, and we believe we've pleaded enough
24 factual detail here to make clear that even under the *Crowley's*
25 relaxed standard, the primary standard used here in the Tenth

1 Circuit, that we've pled enough to remove this claim from the
2 purview of the PSLRA's bar.

3 Now, with regard to some of the cases cited by
4 Mr. Fielding, Your Honor, for example, mentioned the *CKB Holdings*
5 case, *CKB168 Holdings, Limited*, which is the Eastern District of
6 New York decision. In that case, yes, it was a pyramid scheme,
7 and, yes, the Eastern District did find that the interest in *CKB*
8 were a security, but in *CKB*, the participants in the scheme
9 actually also received a security interest, an actual security,
10 what was, I believe, promised to them as a preferred stock in
11 *CKB*. So that's a different fact that we don't have here.

12 And in *Omnitron*, which Mr. Fielding remarked on, yes,
13 the Court did find that *Omnitron* scheme was a security. What's
14 difference in that case? In that case, while there was
15 recruiting, the members actually never did the act of recruiting.
16 They would invite people to a meeting and then the managers would
17 actually hold that meeting and do the actual recruiting. That's
18 the factual distinction there, distinct from what we've pled in
19 our case.

20 So again, Your Honor, I don't want to belabor what is
21 already in our brief, which we believe sets forth why we are
22 not -- our claims are not barred by the PSLRA, do not limit the
23 PSLRA preemption. But, again, in the event this Court does
24 determine that, we've never had an opportunity to plead
25 securities claims. In fact, prior to being in this Court, we

1 were transferred from the Western District of Texas. We were in
2 the Fifth Circuit because of AdvoCare. Because of the law in the
3 Fifth Circuit, we pled this as a RICO claim. So if the Court
4 were to decide that the Tenth Circuit requires PSLRA preemption,
5 we believe we should be afforded the opportunity to replead on
6 that basis.

7 **THE COURT:** All right. No, I --

8 **MR. LINKIN:** Do you have any questions, Your Honor?

9 **THE COURT:** Okay. Thank you, Counsel. And I guess
10 let's talk about particularly your request for the opportunity
11 to amend.

12 Of course, you've not moved for leave to amend so far
13 in this court. Correct?

14 **MR. LINKIN:** We have not, Your Honor, not in your
15 court.

16 **THE COURT:** Right. I know that many district judges
17 are quite lenient with motions to dismiss and dismissing with
18 leave to amend. I tend to be a little stricter there. I tend
19 to say that a request in a brief or argument for the
20 opportunity for leave to amend is something very different from
21 actually filing a motion for leave to amend, where I can
22 actually see, you know, the proposed amendments and know and be
23 able to evaluate whether, in fact, they would solve the legal
24 issues or defects that I see.

25 I think -- the Federal Rules of Civil Procedure, in the

1 2008 amendments, they were amended to make it so that a motion to
2 dismiss, as well as an answer, starts the deadline for being able
3 to amend as a right. And one of the reasons for that, if you
4 read the commentary, was to kind of eliminate the practice of
5 plaintiffs of waiting to see -- of kind of taking a mulligan, of
6 just standing on their allegations and saying, you know, if we
7 survive the motions to dismiss, great; but if we don't, you know,
8 we'll get a free shot, a chance to amend.

9 So I'm actually not a big fan of dismissing with leave
10 to amend where plaintiff is on notice of the potential defects in
11 the complaint and doesn't seek to amend.

12 So I guess what I would advise you is, you know, if you
13 think you have viable claims under the Security Act, I mean
14 you're on notice of the defendant's argument here, I would
15 suggest that you seek leave to amend pretty promptly. And I
16 can't promise I'm going to grant a leave to amend, but I think
17 I'd -- you know, if you want me to consider that possibility, I
18 would suggest that you seek leave to amend before I rule on the
19 motion to dismiss. So that's just my suggestion there.

20 Any questions about that?

21 **MR. LINKIN:** No, Your Honor, I completely understand.

22 And, again, we don't believe the Court should find that
23 our RICO claims are barred by the PSLRA. We didn't believe that
24 before, we don't believe it now.

25 **THE COURT:** Right. No, you're welcome --

1 **MR. LINKIN:** But -- I'm sorry, Your Honor, please.

2 **THE COURT:** No, you're welcome to take your chances
3 on that. You know, if you're confident enough of that that you
4 want to stand on that, that's fine, but I just don't give
5 mulligans very often. Let's just put it that way.

6 **MR. LINKIN:** Certainly, Your Honor, and we understand
7 that and we will -- should we decide to amend, we will follow
8 the process the Court has highlighted for us here today.

9 And, again, I would simply -- this would not, from our
10 view, be taking a mulligan. It would simply be pleading in a
11 manner that might be more appropriate in the Tenth Circuit as
12 opposed to the Fifth Circuit, where we pled the live pleading
13 that's in front of Your Honor.

14 **THE COURT:** Right. And by taking a mulligan, what I
15 mean is where the plaintiff waits to see what the outcome of
16 the motion to dismiss is before they then try and seek leave to
17 amend.

18 **MR. LINKIN:** I perfectly understand that, Your Honor.

19 **THE COURT:** I mean I understand your point. I mean
20 your point is that, you know, if I -- you know, the
21 authority -- there's some split in your authority. There's
22 some uncertainty in the case law here, but there's certainly
23 substantial support for defendants' position, there's some
24 support for your position. As you said, there are some things
25 about some of these cases that are distinguishable from your

1 case, in terms of the way in which recruitment takes place.

2 Certainly, the language "solely" doesn't seem to mean
3 solely and courts have disagreed, though, about how far you can
4 get away from solely. So I mean there's clearly room for
5 disagreement there. And I think your point is, is that even if I
6 agreed with defendants that the RICO claims don't survive and any
7 claim should be brought under the Securities Act, the PSLRA, you
8 think that you would have valid claims there that you could
9 assert. So I understand your position.

10 All right. And I don't think I have further questions.
11 Honestly, I just -- I've read some of these cases, but you've
12 both presented -- I think you've both presented the cases that
13 are most helpful to you. You've both discussed why cases that go
14 the other way, I should either just ignore them or I should
15 distinguish them. So I think I'm pretty clear on both parties'
16 positions on this issue.

17 **MR. LINKIN:** Thank you, Your Honor. Then I'll turn
18 it over to Mr. Tighe.

19 **THE COURT:** All right. Thank you very much.

20 Mr. Tighe, please go ahead and address the other
21 arguments, the arguments that, even assuming the RICO claims can
22 go forward, that they haven't been pled with sufficient clarity.
23 And, you know, addressing both the Rule 9 issue and also just the
24 issues of whether you've properly alleged persons and enterprise
25 and the predicate acts that are not overlapping.

1 **MR. TIGHE:** Thank you, Your Honor. May it please the
2 Court, Austin Tighe for Plaintiff Julie O'Shaughnessy.

3 I'm going to do two things going forward, Your Honor.
4 Number one, I'm going to focus on the briefs and not the
5 PowerPoint.

6 As I sat there and watched the PowerPoint, it occurred
7 to me that the PowerPoint was really about standards of proof,
8 not standards of pleading. And neither argument of counsel,
9 whether it's in the form of oral argument or PowerPoints, this is
10 really on the briefs. And Your Honor is quite familiar with the
11 briefs, so I'm going to focus my argument there. I'm going to
12 further tailor it.

13 I noted when Your Honor asked specific questions to
14 opposing counsel about specific issues, and I have cut my
15 argument voluntarily, tried to read those cues, by about half,
16 and I'm going to try to address those in the order in which they
17 were raised. I think that would make more sense, Your Honor,
18 when I introduce the first argument, which is the requirement for
19 a distinction between enterprises and persons.

20 But first a bit of an overview as to where I see this.

21 So of the four arguments that the defendants are making
22 for dismissing the case on RICO grounds at the pleadings stage,
23 two of the four fail outright, because the Supreme Court has said
24 that pleading requirements that Young Living is trying to impose
25 on us, on those two of the four, simply aren't required. I'll

1 address those directly and I'll make short thrift.

2 The other two arguments fail because of the 25 pages of
3 detailed, specific factual allegations, including allegations of
4 intent, I'll answer the question hanging out there, where are the
5 allegations of intent?

6 But those fail because of the 25 pages of factual
7 allegations in the pleading and they fail because of the law of
8 this circuit. So let's take argument No. 1. That is the
9 argument that the enterprises we allege are not sufficiently
10 distinct from the persons involved.

11 I will stand on our briefing as to Count III. Unless
12 Your Honor has any questions, I will stand on our briefing as to
13 what they refer to as theory A of Count I, and instead, focus on
14 what Your Honor asked about, which is Count I, what they refer to
15 as theory B. That's where Young and Turner, chief executives,
16 are named persons and the entity, Young Living, LC, is the
17 enterprise.

18 I would cite Your Honor to the Tenth Circuit's decision
19 in *AD-X International*, it's a Tenth Circuit 2004 opinion cited
20 and discussed in our brief, along with Supreme Court precedent on
21 page 13 of our brief, where the Tenth Circuit has held that, "In
22 cases like this, where the enterprise is a formal legal entity,"
23 and it's indisputable that Young Living, LC, is a formal legal
24 entity, then, "RICO requirements are most easily satisfied."

25 Continuing on in argument one, there's a more

1 fundamental problem they have with this argument in trying to
2 knock us out on enterprise versus persons. The Tenth Circuit has
3 held in the *Hogan* case that Rule 9(b) doesn't apply to pleading
4 enterprises and fact. It applies to pleading mail and wire fraud
5 predicate acts.

6 Now, in their briefing, Young Living argued that I
7 inserted the word "only." It's not "only" because I inserted it,
8 it's "only" because there are no cases that hold otherwise. To
9 be clear, Rule 9(b) does not apply to pleading an enterprise in
10 fact, so that should make short thrift of the 9(b) argument as
11 to, Your Honor, theory B of Count I, Young and Turner as persons,
12 Young Living, LC, as the enterprise.

13 As to a question Your Honor asked about whether or not
14 Young Living does anything else other than operate what we allege
15 to be a pyramid scheme, it does, and as Your Honor knows, that's
16 relevant under the *Boyle* case from the U.S. Supreme Court. I'd
17 like to make two very brief points about the *Boyle* case.

18 So in *Boyle*, what is required for adequate pleading is
19 we must plead a common purpose, common relationships and
20 longevity. That's the *Boyle* test for whether or not we've
21 adequately pled a RICO claim.

22 At paragraph 117 of the complaint, we plead in Sections
23 A, B and C, each one of those. In fact, Your Honor, as to
24 longevity, 117C, we actually use the word "longevity." We talk
25 about this has been going on since at least 2012. So we meet

1 that aspect of the *Boyle* test.

2 What's the other aspect of the *Boyle* test? The
3 enterprise must exist for some reason other than what we've
4 alleged as illegal conduct.

5 Your Honor raised the example of, do they make the
6 oils? I will give you one other brief example. You or I could
7 go on to the Young Living website right now and buy an essential
8 oil without becoming another brick in the pyramid.

9 Final point on argument one, we agree that a RICO
10 allegation must indicate how the defendants used the enterprise
11 to facilitate the fraud, and we've done that. For Count I, which
12 I've been focused on, paragraphs 59 and 62 are just two of the
13 examples.

14 Now we're going to get to the first of the two
15 arguments that I mentioned the Supreme Court has said that the
16 pleading requirement does not apply. So the second argument,
17 Young Living argues that the case must be dismissed because
18 there's no distinction between the enterprise and between the
19 predicate acts. There is no such pleading requirement. I'll go
20 back to *Boyle*.

21 **THE COURT:** All right. Mr. Tighe, before you move
22 on, does your complaint -- I guess your complaint does allege
23 that people can just buy oils, or maybe that was in your brief.
24 You talked about that. And I think you talked about that as
25 being a reason why the members can't make money selling the

1 oils, is because anyone who wants them can just buy them at the
2 same price the distributors can.

3 Is that in your pleading or was that in your brief?
4 And if it is in the pleadings, where in the pleadings?

5 **MR. TIGHE:** I am going to ask one of my co-counsel to
6 see if they can find that in the pleading. I don't recall if
7 we made that specific argument, Your Honor, in the complaint.
8 I know we made arguments in the complaint about the average
9 annual income being \$25 and people lose money because it costs
10 four times that to sign up. I don't specifically remember if
11 we made the allegation that they could simply buy the oils
12 without joining.

13 My reference to that in this argument, Your Honor, is
14 to simply make sure that I comport with the *Boyle* requirement
15 that that be a fact. And in this instance, I would submit to you
16 that it is.

17 **THE COURT:** Right. But, Counsel, I think the concern
18 is that the *Boyle* requirements need to be met in your pleading
19 and not just your argument. So I guess I'm wondering where --
20 does your pleading allege these other things that Young Living
21 does, that it makes the oils, that it sells the oils directly
22 to nondistributors? Is any of that in the pleadings?

23 **MR. TIGHE:** It is, sir, thanks to Mr. Linkin.
24 Paragraph 31, I guess the third sentence in, Your Honor,
25 "There's no real opportunity for a member to profit from

1 becoming a reseller of oils at a markup," which is the -- which
2 is being a Young Living member, "because anyone can buy the
3 oils at the discounted wholesale price directly from Young
4 Living."

5 And that's -- just on the fly, that's paragraph 31. I
6 won't represent to you that it appears elsewhere, but I will
7 represent to you that I just read from paragraph 31.

8 **THE COURT:** Right. And is there something in the
9 complaint that says as well that Young Living makes these oils?
10 Maybe your co-counsel can help you with that as well.

11 **MR. TIGHE:** I think so, Your Honor. I think when
12 we're giving the history of Mr. Young, the late Mr. Young, and
13 how Young Living came to be, my recollection is we talk about
14 the creation, the mixture and the production of these essential
15 oils, but they're looking for that at this point.

16 **THE COURT:** All right. Well, why don't you tell me
17 when they find it, but you can just move on with your arguments
18 so we aren't just waiting.

19 **MR. TIGHE:** Thank you, sir.

20 Argument No. 2, they argued that the case must be
21 dismissed because there's no distinction between the enterprises
22 and the predicate acts.

23 Under *Boyle*, and this is my third cite to *Boyle*, and I
24 believe my last, the Supreme Court has ruled that there does not
25 need to be a distinction made between the enterprises and the

1 predicate acts. Even if there was a requirement, Judge, under
2 the *Warner* case out of the Seventh Circuit, if one of the
3 alternative enterprises has a separate legal existence, I will
4 return to the point where there's no question that Young Living,
5 LC, has a separate legal existence. It had to file papers to
6 become Young Living, LC.

7 In that case, they are distinct from the predicate
8 acts. In some, they don't need to be and we need not plead that,
9 but we have alleged that and that would work under *Warner*.

10 There's lots in the third argument, Judge, and much of
11 it has to do with mail and wire fraud predicates. And Your Honor
12 mentioned, during opposing counsel's argument, specific questions
13 and issues regarding mail and wire predicate, and I'm sure
14 Your Honor will ask me questions if you have any about those
15 specifics. But I'm going to skip ahead in argument three as to
16 the intent to defraud, because much of what we heard from
17 opposing counsel was there's no intention to defraud.

18 The 25 pages I'm making reference to are all intent to
19 defraud. The fraudulent misrepresentation is you can make an
20 abundance, we've all heard word the "abundance". He used
21 abundance, Your Honor used abundance. So you can make an
22 abundance of money, you can make a lot of money. What we've
23 alleged is that the average income per year is roughly \$25, which
24 is a quarter of what it costs to join, and the majority of
25 members lose money. That makes representations regarding how

1 this can create an abundance fraudulent misrepresentation.

2 Opposing counsel said we don't cite any omissions. I'm
3 suggesting, Your Honor, that the entire range of those 25 pages
4 is a fraudulent omission. What's the omission? The omission is,
5 is that this is a pyramid scheme where you only make money by
6 building your downline. All of those communications, Your Honor,
7 over those 25 pages is about, come to these meetings and learn
8 how you can be part of a family that will grow your revenue, that
9 will grow your life, and will offer these great opportunities.

10 Specifically, we allege in paragraphs 22 to 36 an
11 intention to defraud through recruitment. In paragraph 37, we
12 allege the overwhelming majority of members lose money by paying
13 more than they receive, and enriching those up the pyramid,
14 including those running the pyramid, Young and Turner.

15 Okay. If that fact, as alleged, and it must be at this
16 point, is taken as true, so let's do what we do in 12(b)(6), that
17 is taken as true, how do they -- how is that tied to the acts of
18 an intent to defraud?

19 It's by getting those e-mails and mails out to
20 encourage people to join and to buy into something that is not
21 going to be enriching, that is not going to be money making. We
22 described the false promises of financial awards in paragraph 48,
23 paragraphs 51, 62 and 73. We say that Young and Turner, through
24 their use of false pretenses to deceive, by using material
25 misleading statements of fact regarding what Young Living really

1 is and is not. The complaint by defendants is that doesn't have
2 a who, what, when, where, why and how.

3 Well, it certainly has a what, it certainly has a how,
4 it certainly has a why, but if the argument is we don't say who
5 said it, who took it to the mailbox and dropped it in the
6 mailbox, well, guilty, we don't, because we don't know. But what
7 we do know is that the entire intent of Young Living is fraud,
8 the entire intent. So every single -- every single paragraph of
9 those 25 pages is an intent to defraud.

10 The final argument is argument No. 4 and that regards
11 Count II. Counsel for Young Living discussed this in his
12 argument, said that Count II, the conspiracy count, Your Honor,
13 should be dismissed because we didn't plead an agreement to
14 commit the predicate acts. Much like argument two, the Supreme
15 Court has said there is no such requirement to do so. All that
16 is necessary to maintain Count II, and this is the *Salinas* case
17 on page 25 of our response brief, is an agreement to the overall
18 conspiracy.

19 The overall conspiracy agreed to by Young and Turner is
20 to run a pyramid scheme. And, again, the allegations of how to
21 do so and what was done are set forth in the 25 pages throughout
22 the complaint.

23 Your Honor, I tried to limit my argument somewhat based
24 on some of the issues that you raised during opposing counsel's
25 presentation, but I'm certainly happy to elaborate or answer any

1 questions for that.

2 **THE COURT:** All right. Thank you. I appreciate
3 that. One thing I would like to ask about is the 9(b) issue.
4 And your opposing counsel, Mr. Fielding, he put great emphasis
5 in his argument, and I think it's fair to say that this wasn't
6 a new issue in argument, it's in the briefs as well, on the
7 requirement that you allege with particularity the
8 misrepresentations.

9 And opposing counsel agrees with you, that you don't
10 have to allege that the specific instances of use of the wires or
11 mails contain these misrepresentations, but he's arguing
12 somewhere in your complaint, you have to allege specifically what
13 was said that was false, who said it, when they said it. And I
14 gather part of your argument may be that you just don't agree
15 with that, but if that's true, if opposing counsel is correct,
16 where do you allege with particularity that someone said
17 something false specifically?

18 **MR. TIGHE:** Yes, Your Honor, thank you.

19 So for example, when we talk about the mail and wire
20 fraud, which, again, that doesn't need to be the mechanism,
21 right, of the -- the fraud does not need to be contained within
22 the wire and the mail, and we all agree to that. But in this
23 case, it was, because when you -- and, again, this is throughout
24 all of the paragraphs throughout those 25 pages.

25 When you invite people through wire and mail to join an

1 organization with the promise that they can make a lot of money,
2 and you know that that is a false statement, that covers both the
3 false aspect of the representation and it covers intent to
4 defraud.

5 As to the who, we argue that in all of those
6 paragraphs, with the exception of, I think, maybe 11 or 12
7 paragraphs where we specifically identify Ms. Young and
8 Mr. Turner, we use the phrase "Young Living." It's one of the
9 arguments they made against us for group leading, but in many of
10 those paragraphs we make the argument that Young Living is the
11 one who was making these fraudulent representations. Come to
12 this annual meeting, join this organization, you can make a lot
13 of money, knowing that that's false and intending to have people
14 rely upon that.

15 When we use Young Living in that phrase, it
16 obviously -- a corporation only acts through its individuals. So
17 obviously inherent in that is at least Young and Turner, and
18 perhaps others at Young Living, perhaps someone was assigned the
19 job of recruiting for the annual meeting, which they get together
20 and have a pep rally, where they try to sign up a bunch of people
21 as they go out the door. I don't know if that's Turner and
22 Young. I don't know who that is as an individual. I do know
23 that it's Young Living.

24 So I would represent to you, Your Honor, that we have
25 sufficiently alleged that by alleging that it is Young Living,

1 which is the corporation and the corporation's act through their
2 executives and principals.

3 **THE COURT:** All right. Thank you very much,
4 Mr. Tighe.

5 All right. Mr. Fielding, I'll give you a few minutes
6 if you feel like you need to respond to any of the specific
7 arguments that -- actually, that either of your two opposing
8 counsel have made.

9 **MR. FIELDING:** Yes, Your Honor. I actually have only
10 two things I want to cover really quickly, if I may.

11 **THE COURT:** All right.

12 **MR. FIELDING:** First, Your Honor, let me address --
13 opposing counsel said two out of the three claims fail
14 outright. I want to be clear about this. I mean, Count I, we
15 talked about that, I get that. I get why he says that. I've
16 already conceded, I think that's the closest call, even though
17 we believe the weight of the authority supports us. But on the
18 conspiracy claims, Your Honor, where he says that it's contrary
19 to Supreme Court law, what he's ignoring is -- what opposing
20 counsel is ignoring is the Tenth Circuit law that talks about
21 just because -- well, it specifically references the fact
22 that -- I apologize, Your Honor, let me turn this off.

23 That specifically references the fact that you have
24 to -- you can't just say that there was an agreement, but you
25 have to specifically plead facts to support that agreement. And

1 we cite to those cases in our brief and they don't have a
2 response to that at all, other than to say that -- like it's
3 true, that you have to agree, but you have to have some facts to
4 support that agreement.

5 Let me deal with the other thing, and I think this is
6 probably the most significant of all of it, Your Honor. And that
7 is, I heard him say now that what they're -- when was that, when
8 he was asked, "What is the claimed fraud, like where do you
9 identify?"

10 And his answer was, "Well, we told them" -- "they were
11 told that it would be abundant," is what he said.

12 Now, here's the problem -- a couple of problems with
13 that. First of all, as the Court already noted, there is no --
14 as the Court already noted, there's no who, time, place, content,
15 identity or consequences associated with that particular
16 statement. He just says it's abundant. And in fact, in their
17 pleading they say, you know, that "lured by the promises of
18 abundance," is what they say. But there's no one that's
19 identified when the statement was made, who it was made, what the
20 specific contents were. Like is it just, you'll have an abundant
21 life? The identity of the person making it. And here's what's
22 worse, Your Honor, it's directly contrary to their own pleading.
23 So the class representative, in paragraph 56, identifies how she
24 says she became a member. And this is a quote from paragraph 56.

25 "Julie O'Shaughnessy was also persuaded by the

1 operation of a Young Living distributorship, might at least cover
2 cost of paying approximately \$100 for the starter kit." Okay?

3 Two things that stand out here. Thing number one, "was
4 also persuaded," passive voice. Who persuaded her? How did they
5 persuade her? When did they persuade her? Where? What did they
6 say? Why was it false? We don't know. We just get passive
7 voice, like we do through everything, either that or conclusory
8 statements.

9 Secondly, Your Honor, note that the thing that she said
10 lured her in was not the promise of abundance or riches, but she
11 could at least cover the costs. She was -- according to their
12 petition with their class rep, the class rep says, "I just
13 thought I would break even."

14 So this notion that like what they've pleaded is this
15 case, now they could have -- I suppose they could have pleaded
16 some case that says, "Here's a specific promise that was made,
17 here's when it was made, here's who made it."

18 And by the way, what's interesting, Your Honor, if you
19 look at a lot of the cases, the *Ranieri* case is a great example,
20 the Court ends up dismissing that case, but the Court notes that
21 like at least in that case, the plaintiffs actually identified
22 specific statements from specific people and why the content was
23 false. They don't do any of that here.

24 And I think that's significant and important because,
25 again, what it demonstrates is they just utterly and completely

1 failed under their duty.

2 They also said that -- I heard him say that all through
3 the 25 pages are -- it's full of these, you know, specific
4 statements about who, what, when, where, how, et cetera. Again,
5 here's just -- here's some, we've looked at others, Your Honor,
6 we cite to them in the brief.

7 Here's what the 25 pages consist of: The defendant's
8 group pleading, they use false pretenses, no identification what
9 they are, et cetera, et cetera. So when they say that there's
10 this abundance and things like that, it doesn't square with what
11 their pleadings say. It directly contradicts the allegations the
12 class representative made, and none of this can cure the
13 underlying problem here, which is we still don't know what is the
14 lie that they were told or were told or were supposed to be told,
15 plaintiffs aren't saying.

16 **THE COURT:** All right.

17 **MR. FIELDING:** And for that reason, you have to
18 dismiss.

19 **THE COURT:** All right. Thank you, Mr. Fielding.

20 All right. Again, let's get the PowerPoint down. All
21 right. Thank you.

22 Now, either -- let's see. Either of the counsel for
23 plaintiffs who were speaking, Mr. Linkin and Mr. Tighe, do either
24 of you have any final words that you feel like you just have to
25 say in response to Mr. Fielding's most recent -- what

1 Mr. Fielding just said?

2 **MR. TIGHE:** I do, Your Honor, only not in response to
3 what he said, but in response to the two questions you asked,
4 that I now have the answer to.

5 **THE COURT:** Okay. Please.

6 **MR. TIGHE:** Thank you, Your Honor.

7 We did not specifically plead, having reviewed in the
8 complaint, that Young Living actually manufactured the oils.
9 What we say in paragraphs 20, 31, 41, and 50, is we refer to them
10 as Young Living oils. But really most importantly, I think, is
11 paragraph 29, we refer to them as Young Living products. But the
12 word "manufactured" does not appear, Your Honor, direct answer.

13 **THE COURT:** Thank you.

14 **MR. TIGHE:** The second one has to do with this intent
15 to defraud issue. I think opposing counsel is trying to
16 shoehorn a fraud standard, a securities fraud standard, into a
17 RICO analysis. I was overcomplicating this. It's more simple.

18 A pyramid is by definition fraudulent. It will fail.
19 It's definitionally fraudulent. When we say pyramid scheme, it's
20 definitionally fraudulent. New members will not make money, and
21 we satisfy 9(b) by alleging that this is a pyramid scheme. By
22 doing so, we pled a fraudulent vehicle and all the facts in those
23 25 pages support that.

24 Thank you, Your Honor.

25 **THE COURT:** All right. And let me just ask you a

1 question. Your opposing counsel flirted with the proposition,
2 and didn't quite embrace it, that, you know, even a pure
3 pyramid scheme might not be fraudulent or actionable by an
4 individual investor if it was fully disclosed.

5 Do you disagree with that? Do you think just by
6 definition, a pyramid scheme, even if fully disclosed, is
7 actionable, is fraud?

8 **MR. TIGHE:** I do disagree for this reason: It
9 wouldn't be a pyramid scheme if it was fully disclosed. I'm
10 not trying to cut around circular. It wouldn't exist if full
11 disclosure was made as to the facts that we've alleged.

12 **THE COURT:** All right. Understood.

13 **MR. FIELDING:** Your Honor, if I may real quickly, he
14 raised a point about -- that he hadn't made before, that the
15 mere fact that they're inherently fraudulent itself saves them.
16 I'll just note that the *Ranieri* case specifically rejects that,
17 the case that they liked from the PSLRA.

18 Let me read from the *Ranieri* case at page 917.

19 "Plaintiffs contend that in the Fifth Circuit, pyramid
20 schemes are inherently fraudulent, thus they argue allegations
21 that the individual defendant supervised the scheme suffice to
22 show scienter or intent."

23 The Court then says, "Plaintiffs spend several pages
24 detailing how the individual defendants defended AdvoCare for
25 pyramid scheme allegations, but provide no facts or circumstances

1 from which the Court can infer that they knew or showed reckless
2 disregard for the truth of those assertions."

3 And in fact, what the Court did in the *Ranieri* case,
4 the Court dismissed the RICO claims, precisely because this
5 argument that you just heard opposing counsel make right now,
6 that, well, it's a pyramid scheme and all I have to do is allege
7 that they were involved in it, the Court noted that's not how it
8 works. You have to identify what they did, how they did it and
9 that they knew about it.

10 **THE COURT:** All right. Thank you. I understand your
11 arguments.

12 Thank you. It's been kind of a lengthy hearing but
13 it's been very helpful. I appreciate all of the arguments that
14 you've made. Before we adjourn, are there any other matters that
15 the Court needs to take under consideration at this time?

16 For the defendant, anything?

17 **MR. FIELDING:** Nothing from us, Your Honor.

18 **THE COURT:** All right. How about the plaintiffs?
19 Anything we need to address at this time?

20 **MR. LINKIN:** Nothing from plaintiffs, Your Honor,
21 thank you.

22 **THE COURT:** Very well. Thank you. And court is
23 adjourned.

24 (Concluded at 2:38 p.m.)

25 CERTIFICATE OF COURT REPORTER

1
2 This is to certify that the proceedings in the
3 foregoing matter were reported by me in stenotype and
4 thereafter transcribed into written form;

5 That said proceedings were taken at the time and
6 place herein named;

7 I further certify that I am not of kin or otherwise
8 associated with any of the parties of said cause of action and
9 that I am not interested in the event thereof.

10 In witness whereof I have subscribed my name this
11 17th day of March 2021.

12
13 _____
14 Teena Green, RPR, CSR, CRR, CBC
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